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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1

13 ADRIAN LOPEZ, individually, and on
14 behalf of all others members of the
general public similarly situated.

15 Plaintiff.

16 | VS

17 K MART CORPORATION, a Michigan
18 corporation; and DOES 1 through 10,
inclusive.

19 Defendants.

Case No.: 3:15-CV-01089-JSC

[Assigned for All Purposes to
Hon. Jacqueline Scott Corely]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

Date: April 30, 2015

Time: 9:00 a.m.

Courtroom: F, 15th Floor

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1 **I. INTRODUCTION**

2 Kmart Corporation's Motion to Compel Arbitration And Stay Action ("Motion")
3 should be denied for several reasons. Most fundamentally, Kmart has failed to establish
4 the existence of a valid and enforceable agreement to arbitrate. Indeed, Plaintiff Adrian
5 Lopez ("Plaintiff" or "Lopez") was only sixteen and in high school when he purportedly
6 acknowledged the "Arbitration Policy/Agreement" ("Agreement") upon being hired. As
7 a minor, he lacked the capacity to contract under California law. Therefore there is no
8 enforceable contract between Kmart and Lopez. Moreover, shortly after turning
9 eighteen in December 2014, the legal age of majority for purposes of entering a contract
10 under California law, Lopez filed this class action to exercise his right to disaffirm the
11 Agreement. Clear authority provides he has the power to do so within a reasonable time
12 of reaching the age of majority. When a contract is disaffirmed, it is legally void and a
13 nullity pursuant to governing statutory and case law. This law is designed to protect
14 minors from unfair contracts, and to discourage adults, who must assume the risk of
15 disaffirmance, from contracting with a minor. Because the Agreement is legally void
16 and a nullity, Lopez may bring his claims in court and has no obligation to engage in
17 arbitration.

18 Separately, even if the arbitration agreement between the parties lacked the above
19 infirmities, the Agreement is unenforceable because it is both procedurally and
20 substantively unconscionable. Kmart's Agreement was presented to Lopez on a take-it-
21 or-leave-it basis as a condition of his employment, despite the inclusion of a purported
22 "opt-out" provision. At the time he acknowledged the Agreement, Plaintiff was a minor
23 in a weak and vulnerable bargaining position and the Agreement was never explained to
24 him. And under numerous cases, an opt-out provision does not insulate an arbitration
25 agreement from being found to be procedurally unconscionable, particularly where the
26 opt-out procedure is designed to discourage employees' use of it, as is the case here. In
27 addition, the terms of the Agreement are one-sided in favor of Kmart, including its
28 acknowledgement that contained no essential terms of the Agreement.

1 For all of these reasons, Kmart's Motion to Compel Arbitration should be denied
2 in its entirety.

3 **II. FACTS AND PROCEDURE**

4 Lopez was hired by Kmart on or about April 16, 2013, when he was sixteen years
5 old and a sophomore in high school. (Declaration of Adrian Lopez ["Lopez Decl."] ¶ 2.)
6 He was employed as an hourly-paid cashier at Kmart's Concord retail store location.
7 (*Id.*) Despite his April date of hire, he did not begin working until mid-May 2013. (*Id.*).
8 Before he began working in May, Kmart notified Lopez through email that he needed to
9 complete Kmart's training requirements online. (*Id.* at ¶ 3.) Included in these
10 requirements was the Agreement, although no one from Kmart ever explained to Lopez
11 that there was an arbitration agreement. In fact, the Agreement was just one of
12 numerous other training requirements and acknowledgements that Lopez was instructed
13 to complete online. (*Id.*)

14 Despite Lopez being a minor at the time, Kmart never asked his parents to
15 consent to any documents or the Agreement imposed on Lopez. (Lopez Decl. ¶ 3.)
16 Lopez "had absolutely no idea what arbitration was" or that it differed from bringing suit
17 in court. (*Id.*) Nor did he know he was waiving his right to bring an action in court.
18 (*Id.*)

19 In order to complete the required training, he used his laptop computer at his
20 home. (Lopez Decl. ¶ 4.) Because he had to complete other materials related to him
21 being newly hired, such as direct deposit forms and the like, at the same time as the
22 training requirements, Lopez reviewed the materials quickly for fear that certain
23 documents would not get processed in a timely manner and he would not be able to start
24 work or get paid on time. (*Id.*) No Kmart personnel walked him through the materials,
25 such as the Agreement. No one explained to him that the training requirements included
26 an arbitration agreement or the significance of arbitration.

27 He was never told that he could negotiate any terms or review anything with an
28 attorney prior to accepting or acknowledging the Agreement. (Lopez Decl. ¶ 5.)

1 Because he was instructed to complete the training requirements, Lopez thought he had
 2 to agree to all of the documents and acknowledgements in order to work at Kmart. (*Id.*)
 3 In turn, he did not believe he could modify or dispute any of the documents, including
 4 the Agreement. In addition, the arbitration agreement opt-out procedure was never
 5 explained to him. (*Id.*)

6 On January 20, 2015, Lopez brought a class action against Kmart alleging claims
 7 for violation of California Labor Code section 226(a) (non-compliant wage statements)
 8 and violation of California Business and Professions Code sections 17200, *et seq.*, for
 9 which Kmart now seeks to compel arbitration.

10 **III. ARGUMENT**

11 **A. There is No Valid, Enforceable Agreement To Arbitrate Lopez's 12 Claims Because He Was A Minor And He Is Entitled To Disaffirm 13 The Purported Arbitration Agreement**

14 It is well-established that the party seeking to compel arbitration has the burden of
 15 proving the existence of a valid agreement to arbitrate. *See, e.g., Roe v. SFBSC Mgmt.,*
*LLC, No. 14-cv-03616-LB, 2015 U.S. Dist. LEXIS 26057, *13-14 (N.D. Cal. March 2,*
2015); Sparks v. Vista Del Mar Child & Family Services, 207 Cal. App. 4th 1511, 1518
(2012). Though the FAA incorporates a strong federal policy of enforcing arbitration
 19 agreements, that policy does not arise until the party seeking to compel arbitration
 20 establishes the existence of an enforceable agreement. *Id.* Kmart fails to carry its burden
 21 of establishing a valid agreement was ever formed because Lopez was a minor at the
 22 time he acknowledged receipt of Kmart's Agreement. In the alternative, even if the
 23 Agreement had formed, Lopez has the right to disaffirm it, which he is exercising.

24 **1. No Valid Agreement To Arbitrate Lopez's Claims Ever 25 Formed Because, At The Time He Acknowledged Receipt Of 26 Kmart's Agreement, He Was A Minor**

27 When evaluating the validity of an agreement to arbitrate, federal courts "should
 28 apply ordinary state-law principles that govern the formation of contracts." *First*

1 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Kmart acknowledges this
 2 principle. (Def. Mot. at 9 (“For the ‘validity’ inquiry, courts generally apply ordinary
 3 state law contract principles.”). For a valid contract, California law requires that there be
 4 parties capable of contracting, their consent, a lawful object, and consideration. *See* Cal.
 5 Civ. Code § 1550 (listing these “[e]ssential elements of contract”).[.] “Under California
 6 law, an individual under the age of eighteen is a minor.” *Johns v. County of San Diego*,
 7 114 F.3d 874, 877 (9th Cir. 1997); Cal. Fam. Code § 6500¹ (“A minor is an individual
 8 who is under 18 years of age.”).

9 Minors, under California law, are incapable of contracting. Cal. Civ. Code §
 10 1556 (providing that “[a]ll persons are capable of contracting, **except minors**, persons of
 11 unsound mind, and persons deprived of civil rights.”) (emphasis added). This is because
 12 a primary concern of the Legislature “has been to protect minors from suffering unfair
 13 treatment in their dealings with adults simply by reason of their immaturity.” *People v.*
 14 *Lara*, 67 Cal. 3d 365, 379 (1967). Thus, the “most conspicuous examples of this
 15 solicitude are found in the law of contracts, under which a minor is generally deemed to
 16 lack the capacity to enter into a binding agreement.” *Id.* (citing Cal. Civ. Code § 1556).

17 Kmart fails to establish one of the essential requirements for establishing a valid
 18 contract. In its motion, K-Mart neglects California’s requirement that parties must be
 19 capable of contracting. Nor did K-Mart indicate that Lopez lacked the capacity to
 20 contract, or that any such issue was in doubt. Of course, Lopez was only sixteen years
 21 old when he was hired by Kmart on April 16, 2013, and when he purportedly
 22 acknowledged the Agreement on May 20, 2013. (Lopez Decl. at ¶ 2; Def. Mot. at 5:4-8
 23 (citing May 20, 2013, as the date Lopez “acknowledged receipt of the Agreement and
 24 agreed to be bound”). Plaintiff was therefore a minor at the time he purportedly entered

25
 26 ¹ The “capacity of a minor to contract is governed by [provisions] of the Family
 27 Code.” Cal. Civ. Code § 1557. Therefore, the provisions cited in the Family Code
 28 throughout apply under these circumstances and they are not limited to specific family
 law issues or family court.

1 the Agreement, and, as such, the Agreement is not binding against him. *See, e.g., In re*
 2 *Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1036 n. 4 (N.D. Cal. 2012) (citing
 3 California Civil Code section 1556) (noting that the law allocates the risk of contracting
 4 with a minor to the other contracting party given the minor's lack of capacity to contract,
 5 which affects "the ability of the other party to enforce the contract against the minor. ").
 6 Lacking the necessary elements of a contract, Kmart has thus failed to prove the
 7 existence of any enforceable agreement against Lopez.

8 **2. In The Alternative, Because Lopez Was A Minor When He
 9 Acknowledged The Agreement, He May Disaffirm It**

10 Even were the Court to find that an Agreement had formed despite Lopez's
 11 minority at the time, California law expressly provides minors the power to disaffirm
 12 any such contracts into which they may have entered. Specifically, "a contract of a
 13 minor may be disaffirmed by the minor before majority or within a reasonable time
 14 afterwards." Cal. Fam. Code § 6710 (right of disaffirmance); *see also* Cal. Fam. Code §
 15 6700 ("[A] minor may make a contract in the same manner as an adult, subject to the
 16 power of disaffirmance."). Such statutes serve the dual purpose of protecting children
 17 and discouraging adults from contracting with children.² *See, e.g., I.B. v. Facebook*, No.

18

 19 ² The policy of California is to give an added layer of protection to minors, who
 20 retain the power to control enforcement of the contracts they enter. First, as discussed in
 21 the previous section, the law allocates the risk of contracting with a minor to the adult
 22 party by establishing a bright line age rule under which the minor is conclusively
 presumed incompetent to contract, if the minor raises the issue. Second, the minor may
 disaffirm the contract if made under the age of majority, while the other party does not
 retain such a right of disaffirmance:

23 Cal. Civ. Code § 1556 states that minors are not capable of
 24 contracting. A minor's lack of capacity to contract affects
 25 only the ability of the other party to enforce the contract
 26 against the minor, not the minor's ability to enforce the
 27 contract against the other party. Under Cal. Fam. Code §
 6710, minors may avoid liability on contracts, subject to
 certain exceptions. However, only the minor, and not the
 other party, may disaffirm a contract.

28 *In re Apple In-App Purchase Litigation*, 855 F. Supp. at 1036.

1 12-cv-01894-BLF, 2015 U.S. Dist. LEXIS 29357, *12-14 (N.D. Cal. March 10, 2015)
 2 (citing Family Code section 6710 and noting the “strong public policy in favor of
 3 protecting minors, and even more so, of discouraging adults from contracting with
 4 minors.”); *Burnand v. Irogoyen*, 30 Cal. 2d 861, 866 (1947) (“One deals with infants at
 5 his peril. . . . The policy of the law is to discourage adults from contracting with an infant
 6 and they cannot complain if as a consequence of violating the rule they are injured by the
 7 exercise of the right of disaffirmance vested in the infant.”).

8 Here, Lopez is exercising his power to disaffirm the Agreement. He turned
 9 eighteen years of age on December 19, 2014. (Lopez Decl. ¶ 7.) Rather than pursue
 10 arbitration under the Agreement, he filed this class action on January 20, 2015,
 11 approximately one month after reaching the age of majority, with the clear objective
 12 intent to disaffirm any purported right of Kmart to compel arbitration of his claims.
 13 Moreover, this briefing was filed shortly afterward explicitly reaffirming Lopez’s intent
 14 to disaffirm the Agreement. Lopez has thus invoked his right to disaffirm the
 15 Agreement within a “reasonable time” of reaching majority. (Cal. Fam. Code § 6710.)
 16 Moreover, “[d]isaffirmance may be made by any act or declaration and express notice to
 17 the other party is unnecessary.” *Celli v. Sports Car Club of Amer., Inc.*, 29 Cal. App. 3d
 18 511, 517 (1972); *Berg v. Traylor*, 148 Cal. App. 4th 809, 820 (2007) (“No specific
 19 language is required to communicate an intent to disaffirm.”). Consequently, the filing
 20 of this action, and this subsequent opposition to Kmart’s motion, both serve as Lopez’s
 21 timely disaffirmance.

22 Therefore, Lopez’s minority status upon entering the Agreement entitles him to
 23 disaffirm that Agreement. *See Berg*, 148 Cal. App. 4th at 817 (finding that the
 24 appellant’s “minority status entitled him to disaffirm the agreement [containing an
 25 arbitration provision]” and disaffirm the arbitration award itself). In *Berg*, the Court of
 26 Appeal reversed a judgment that had confirmed an arbitration award because the
 27 appellant who had been a minor “was entitled to and did disaffirm the agreement which,
 28 among other things, required him to arbitrate his disputes.” *Id.* at 820.

1 Lopez's minority status at the time he purportedly entered the Agreement, and his
 2 subsequent disaffirmance of that Agreement, distinguish the instant case from the other
 3 case involving Kmart's arbitration agreement (or cases involving Sears' agreement) on
 4 which Kmart relies. Indeed, none of these cases involved a defendant's attempt to
 5 impose its arbitration agreement on a minor. *See, e.g., Lucero v. Sears*, No. 14-cv-1620
 6 AJB (WVG), 2014 U.S. Dist. LEXIS 168782 (S.D. Cal. Dec. 2, 2014); *Mill v. Kmart*,
 7 No. 14-cv-02749-KAW, 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. Nov. 26, 2014);
 8 *Velazquez v. Sears*, No 13cv680-WQH-DHB, 2013 U.S. Dist. LEXIS 121400 (S.D. Cal.
 9 Aug. 26, 2013).

10 As a result of Lopez's disaffirmance of the Agreement, it is void and
 11 unenforceable. *Deck v. Spartz, Inc.*, No. 2:11-CV-01123-JAM-DAD, 2011 U.S. Dist.
 12 LEXIS 110038, *17 (E.D. Cal. Sept. 27, 2011) ("The legal effect of the alleged
 13 disaffirmation . . . is that all terms of the contract are now legally void."). Accordingly,
 14 "[d]isaffirmation by a minor rescinds the entire contract, rendering it a nullity." *Id.* at
 15 *16. As the Agreement is "legally void" and a "nullity," Lopez has no obligation to
 16 engage in the arbitration of this action and may bring his claims in court.

17 **B. Separately, The Agreement Is Unconscionable And Thus
 18 Unenforceable**

19 Even if a valid agreement to arbitrate had formed between the parties despite
 20 Lopez's minority status, it is unenforceable on unconscionability grounds. "Like other
 21 contracts, arbitration agreements can be invalidated for fraud, duress, or
 22 unconscionability." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 921 (9th Circuit
 23 2013) (applying California's general principle of contract unconscionability to an
 24 arbitration agreement). "Under California law, a contract is unenforceable if it is both
 25 procedurally and substantively unconscionable." *Circuit City Stores v. Adams*, 279 F.3d
 26 889, 893 (9th Cir. 2002). Procedural unconscionability "concerns the manner in which
 27 the contract was negotiated and the respective circumstances of the parties at that time,
 28 focusing on the level of oppression and surprise involved in the agreement." *Chavarria*,

1 733 F.3d at 922. In assessing procedural unconscionability, oppression addresses “the
 2 weaker party’s absence of choice and unequal bargaining power that results in ‘no real
 3 negotiation.’” *Id.* Substantive unconscionability focuses on terms that are unreasonably
 4 favorable to the other party and “unjustifiably one-sided.” *Id.* at 923; *see also Stirlen v.*
 5 *Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1531 (1997). Although both procedural and
 6 substantive unconscionability must be shown for the agreement to be invalidated, the
 7 courts apply a “sliding scale” analysis, wherein “greater substantive unconscionability
 8 may compensate for lesser procedural unconscionability” and vice versa. *Chavarria*,
 9 733 F.3d at 922; *see also Armendariz v. Foundation Health Psychcare Services, Inc.*, 24
 10 Cal. 4th 83, 114 (2000) (noting the sliding scale analysis for unconscionability).³

11 **1. The Agreement Is Procedurally Unconscionable**

12 The Agreement is procedurally unconscionable for three reasons: (1) it was
 13

14 ³ Kmart acknowledges that the savings clause of the FAA “preserves generally
 15 applicable contract defenses such as unconscionability” and the sliding-scale analysis
 16 employed by courts to assess unconscionability. (Def. Mot. at 10.) Such an analysis is
 17 not dependent on *Armendariz*. Nevertheless, Kmart also contends that *Armendariz* is no
 18 longer good law. However, the *Armendariz* unconscionability doctrine remains good
 19 law after *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *See Lau v.*
 20 *Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 U.S. Dist. LEXIS 11358, *19-
 21 20 (N.D. Cal. Jan. 31, 2012) (citing *Armendariz* and noting that “*Concepcion* does not
 22 affect the traditional analysis used to determine whether an arbitration clause is
 23 unconscionable,”); *Roe v. SFBSC Management, LLC*, No. 14-cv-03616-LB, 2015 U.S.
 24 Dist. LEXIS 26057 (N.D. Cal. March 2, 2015) (following *Armendariz* without question
 25 to its viability); *see also Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1159
 26 (2013) (noting that *Armendariz* remains “the seminal California case to examine
 27 unconscionability in the context of adhesive arbitration agreements”); *Samaniego v.*
Empire Today, LLC, 205 Cal. App. 4th 1138 (2012) (“arbitration agreements remain
 28 subject, post-*Concepcion*, to [Armendariz] unconscionability”). Moreover, two of the
 three cases Kmart cites to support *Armendariz*’s abrogation merely note that the decision
 has been questioned but do not make any determination themselves. *See Ruhe v.*
Masimo Corp., No. SACV 11-00734-CJC(JCGx), 2011 U.S. Dist. LEIXS 104811
 (C.D. Cal. Sept. 16, 2011) (noting that “[i]t seems that no court has yet ruled explicitly
 on this issue,” and that “[t]his Court need not make this determination in this case.”);
Burnett v. Macy’s West Stores, Inc., No. 1:11-cv-01277, 2011 U.S. Dist. LEXIS 116479,
 *9-10 & n. 3 (E.D. Cal. Oct. 7, 2011) (noting that the court “need not decide the issue”
 and instead assumes “that the [Armendariz] requirements are *not* preempted by the
 FAA.”) (emphasis in the original).

1 forced on Lopez on a take-it-or-leave it basis as a condition of his employment; (2)
 2 Lopez was a minor and lacked sophistication; and (3) the Agreement is generic,
 3 containing no language specifically applying to Lopez. Moreover, as explained below,
 4 the inclusion of the “opt-out” provision does not diminish or defeat the conclusion that
 5 the Agreement is procedurally unconscionable.

6 First, as a condition of employment, Lopez was instructed to complete the policy
 7 acknowledgments in the online training portal. As Kmart admits, “[e]mployees *are*
 8 *required* to complete select policy acknowledgements in the MPI portal.” (Def. Mot. at
 9 4 (emphasis added).) The arbitration Agreement acknowledgment is one of these “select
 10 policy acknowledgments,” purportedly binding Lopez unless he later chose to opt out.
 11 Indeed, the acknowledgement computer screen page for the Agreement only has two
 12 options for employees to click on or choose: “yes” and “submit.” (See Exh. B to
 13 Declaration of Roberta Kaselitz [“Kaselitz Decl.”], Dkt. No. 5-6 (including a screen shot
 14 entitled “Acknowledgement Link”).) There is no button on the page for which an
 15 employee may decline to accept the Agreement. The Agreement was drafted solely by
 16 Kmart, the party of superior bargaining strength, and presented to Lopez, the subscribing
 17 party, giving him only the opportunity to adhere to the contract without modification on
 18 a take-it-or-leave-it basis. In such circumstances, an agreement is procedurally
 19 unconscionable. *See, e.g., Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010)
 20 (“[A] contract is procedurally unconscionable under California law if it is ‘a standardized
 21 contract, drafted by the party of superior bargaining strength, that relegates to the
 22 subscribing party only the opportunity to adhere to the contract or reject it.’); *Bowlin v.*
 23 *Goodwill Indus. Of the Greater E. Bay*, No. 12-cv-01593, 2013 U.S. Dist. LEXIS
 24 10506, *9-10 (N.D. Cal. Jan. 24, 2013) (finding a contract procedurally unconscionable
 25 because the employee had no opportunity to negotiate terms).

26 Second, the fact that Lopez was a minor—indeed, just a sophomore in high
 27 school—adds to its procedural unconscionability. Lopez was a child, in a weak and
 28 vulnerable bargaining position vis-à-vis Kmart, a massive international retail

1 conglomerate. No Kmart employee explained to Lopez that he was being made to enter
 2 an arbitration agreement, or sought the consent of Lopez's parents, or told Lopez that he
 3 could review the materials with an attorney prior to accepting or acknowledging the
 4 Agreement. (Lopez Decl. ¶¶ 4-5.) The fact that a party is "young and unsophisticated"
 5 is a factor courts have applied in finding procedural unconscionability. *Higgins II v.*
 6 *Super. Ct.*, 140 Cal. App. 4th 1238, 1252 (2006). This is because procedural
 7 unconscionability focuses on the unequal bargaining power of the parties, and can be
 8 found where, as here, one party has "overwhelming bargaining power." *Nagrampa v.*
 9 *MailCoups, Inc.*, 469 F.3d 1257, 1284 (9th Cir. 2006); *see Mercuro v. Super. Ct.*, 96 Cal.
 10 App. 4th 167, 174 (2002) ("[P]rocedural unconscionability focuses on the
 11 oppressiveness of the stronger party's conduct.").

12 Third, the Agreement fails to identify Lopez or his job description; instead it is
 13 merely generic. (*See, e.g.*, Kaselitz Decl., Exh. A at 1, Dkt. No. 5-5 (referring to any
 14 employee by use of the generic term "Associate" by providing that "[u]nder this
 15 Agreement, and subject to certain exceptions specified within the Agreement, all
 16 employment-related disputes between you ("Associate") and Company that are not
 17 resolved informally shall be resolved by binding arbitration") This lack of
 18 specificity also contributes to procedural unconscionability. *See, e.g., Laughlin v.*
 19 *VMware, Inc.*, No. 5:11-CV-00530 EJD, 2012 U.S. Dist. LEXIS 12262 (N.D. Cal. Feb.
 20 1, 2012) (holding that the employment agreement "was not tailored to include Plaintiff's
 21 name nor did it describe her employment" and thus was procedurally unconscionable).
 22 There is nothing about this Agreement that was tailored to Lopez.

23 In addition, the two cases Kmart raises to attempt to establish lack of
 24 unconscionability are distinguishable. Neither involved a multinational corporation
 25 attempting to assert an arbitration agreement against an individual who had been in tenth
 26 grade at the time the purported contract had been entered. *See Kilgore v. KeyBank, N.A.*,
 27 673 F.3d 947 (9th Cir. 2011); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir.
 28 2002). In addition, *Ahmed* is distinguishable because there the arbitration agreement was

1 spelled out not only in written materials but also in a videotape presentation. *Ahmed*,
2 283 F.3d at 1199-1200. Here, Lopez was simply told to complete all of the training
3 requirements including the Agreement online, and did so at home without any video
4 presentations or Kmart personnel walking him through the material. (Lopez Decl. ¶¶ 3-
5 4.) Further, the opt-out provision in *Kilgore* was 60 days and thus provided twice the
6 time for employees to exercise that right as Kmart's agreement. Moreover, although
7 Kmart makes much out of the opt-out provision here, under established law the choice of
8 opting out does not necessarily insulate an agreement from a finding of procedural
9 unconscionability. *See Nagrampa*, 469 F.3d at 1282-1284 (noting that the contract was
10 non-negotiable and that the plaintiff's "only choice was to sign it as written or to opt
11 out," the court found procedural unconscionability based on the unequal bargaining
12 power of the parties and the take-it-or-leave-it basis of the contract); *see also Gentry v.*
13 *Superior Court*, 42 Cal. 4th 443, 451, 470 (2007), overruled on other grounds by
14 *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014) (finding an
15 arbitration agreement with a 30-day opt-out period to have "an element of procedural
16 unconscionability notwithstanding the opt-out provision" and that the "failure to opt out .
17 . . [does] not represent an authentic informed choice" due to unequal bargaining power
18 between employer and employee).

19 Furthermore, Kmart cannot avert a finding of procedural unconscionability
20 simply by pointing out that some terms of the Agreement were set apart or bolded. (Def.
21 Mot. at 11.) Whether the terms of an arbitration agreement are "hidden in the prolix" or
22 clear goes only to "surprise," which is a separate inquiry from "oppression" within the
23 procedural unconscionability analysis—and surprise is not a necessary element for
24 finding procedural unconscionability. *See Abramson v. Juniper Networks, Inc.*, 115 Cal.
25 App. 4th 538, 656 (2004) ("Where an adhesive contract is oppressive, surprise need not
26 be shown."); *see also Nagrampa*, 469 F.3d at 1281 ("A contract of adhesion is defined
27 as 'a standardized contract, imposed upon the subscribing party without an opportunity
28 to negotiate the terms.'").

Moreover, even if demonstrating “surprise” were the only method of establishing procedural unconscionability, simply bolding or setting off certain terms does not immunize that language from attack as being unfairly surprising. Indeed, under certain circumstances the drafting/imposing party must actually point out the existence and meaning of certain terms to the weaker party. *See, e.g., Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 359-360 (1976) (noting that “conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness. Where a contractual provision would defeat the ‘strong’ expectation of the weaker party, it may also be necessary to call his attention to the language of the provision.”). “[I]f the language of such provision is too complicated or subtle for an ordinary layman to understand, he should be given a reasonable explanation of its implications.” *Id.* at 359. Here, there are dense, complex passages in the seven-page, single-spaced Agreement that require an explanation. (*See, e.g.*, Exh. A to Kaselitz Decl. at 3, Dkt. No. 5-5 (“The Private Attorney General Action Waiver shall not be severable from this Agreement in any lawsuit in which (1) the complaint is filed as a private attorney general action and (2) the civil court of competent jurisdiction in which the complaint was filed finds the Private Attorney General Action Waiver is unenforceable (and such finding is confirmed by the appellate review if review is sought). In such instances, the private attorney general action must be litigated in a civil court of competent jurisdiction and not as a private attorney general arbitration.”).) Moreover, Lopez was not even an “ordinary layman,” but was a minor still in high school at the time of purportedly acknowledging the Agreement and was given no explanation about the Agreement, its significance, or even its existence among all of the training requirements he had to complete. (Lopez Decl. ¶¶ 3-4.) As a result, there is a high level of procedural unconscionability here.

2. The Agreement Is Substantively Unconscionable

Both Kmart’s acknowledgement process and its opt-out procedure are substantively unconscionable. As a threshold matter, the actual acknowledgement procedure for Kmart’s Agreement itself is one-sided in favor of the company and

1 substantively unconscionable. There is no opportunity for employees to sign Kmart's
2 actual Agreement, but instead are only given the option to click "yes" and "submit" on
3 the acknowledgment page, purportedly binding them to the agreement unless they
4 affirmatively opt out within 30 days. Such a procedure that does not require an
5 employee to sign and instead purports to bind them unless they opt out has been struck
6 down by a federal district court, holding that it "stands the concept of fair dealing on its
7 head." *See Williams v. Securitas*, No. 10-7181, 2011 U.S. Dist. LEXIS 75502, *7 (E.D.
8 Penn. July 13, 2011). Moreover, the acknowledgment that purportedly bound Lopez to
9 the Agreement contains no essential terms whatsoever, including the definition of
10 arbitration or the fact that Lopez would be waiving statutory rights by submitting the
11 acknowledgement. (*See* Exh. B to Kaselitz Decl., Dkt. No. 5-6 (screen shot for
12 Acknowledgement Link.) In fact, based on the screen shots provided by Kmart,
13 employees can click on the link for the acknowledgement page and submit their
14 acknowledgment without ever having to access the terms of the Agreement first or at all.
15 (*See id.* (screen shot for Arbitration Policy Link, listing four separate links including a
16 separate link for the acknowledgement page).) And as mentioned above, the
17 acknowledgement page does not offer any way for employees to decline the
18 acknowledgement, as it only has a "yes" and "submit" button. Such a procedure is
19 designed to thwart any attempt to decline the Agreement while completing the online
20 portal training process, in particular when the acknowledgement is required as part of the
21 training materials.

22 In addition, the purported "opt-out" procedure is unnecessarily convoluted,
23 clearly intended to thwart its invocation, and as such is another substantively
24 unconscionable term of the Agreement. The ostensible availability of "opting out"
25 creates the illusion of choice for employees, when the procedure is actually designed to
26 discourage opt outs, thus giving Kmart the advantage of ensuring that as many
27 employees as possible are bound by the Agreement, while later being able to argue that
28 its arbitration procedure is voluntary. First, Employees are given only a single method of

1 opting out: by signing and returning an opt-out form via U.S. Mail to an Illinois address.
2 (See Exh. A to Kaselitz Decl., Dkt. No. 5-5 (arbitration agreement containing opt-out
3 form on last page).) Employees cannot submit the form in person to any member of
4 Kmart's management team at their jobsite. However, while they are prohibited from
5 submitting their opt-out forms at their place of employment or online, Kmart employees
6 are required to submit their Agreement "acknowledgements" at the jobsite through the
7 online portal or anywhere they access a computer. They need only click a submit button
8 on a computer to do so, and there's no other option provided. In other words, Kmart
9 implements easy procedures for submitting certain employee forms (those acquiescing
10 to its arbitration procedure), but erects barriers such as requiring mail-in procedures
11 within a tight timeframe for other employee forms (those by which employees are
12 rejecting its arbitration procedure).

13 Federal district courts have found similar arbitration opt-out provisions to be
14 unconscionable. For instance, in *Piekarski v. Amedisys Ill., Inc.*, 4 F. Supp. 3d 952 (N.D.
15 Ill. Nov. 12, 2013), the Court found a similar opt-out procedure to be invalid because it
16 required employees to "affirmatively complete several steps," including opening links to
17 access documents, printing out the document, signing it, and mailing it to a remote
18 address within 30 days. *Id.* at 956. The *Piekarski* court found that this process was
19 designed to discourage opt-outs, since "Defendants intended its employees would not
20 follow all these steps and would instead be bound to arbitrate their grievances." *Id.*
21 Kmart's opt-out procedures similarly require several affirmative steps: employees must
22 access a computer, access the appropriate link, print out the opt-out form, complete and
23 sign it by hand, then mail it to a remote address—while the acknowledgement procedure
24 is decidedly much easier to do and can be done at Kmart with the click of a button on the
25 computer.

26 **IV. CONCLUSION**

27 Based on the foregoing, Lopez respectfully requests that the Court deny Kmart's
28 Motion in its entirety.

1 Dated: March 30, 2015

Respectfully submitted,

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